St. Francis Healthcare Centre *and* District 1199, the Health Care and Social Services Union, SEIU, AFL–CIO. Case 8–CA–29739

June 12, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

Pursuant to a charge filed on March 11, 1998, the Acting General Counsel of the National Labor Relations Board issued a Complaint and Notice of Hearing on April 14, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 8–RC–15410.[1] (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended answer admitting in part and denying in part the allegations in the complaint, and alleging defenses.

On May 13, 1998, the Acting General Counsel filed a Motion for Summary Judgment. On May 15, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answers the Respondent admits its refusal to bargain, but attacks the validity of the certification on the following bases: (1) the Board should not have set aside the first election; (2) the Respondent's objections to the second election; and (3) the Board's underlying unit determination in the representation proceeding.[2]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Ohio not-for-profit corporation, with an office and place of business in Green Springs, Ohio, has been engaged in the operation of a skilled nursing care and rehabilitation facility.

Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of $250,000 and, purchases and receives at its Green Springs facility goods valued in excess of $50,000 directly from points outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

[1] The Acting General Counsel's Motion for Summary Judgment inadvertently refers to Case 8–RC–15230.

[2] The Respondent's answers assert as affirmative defenses, inter alia, that the allegations of the complaint are barred by Sec. 10(b) of the Act to the extent they assert unfair labor practices occurring over 6 months prior to the filing of a valid charge, and that the complaint is also barred by the doctrine of laches. We find that neither of these defenses raises an issue requiring a hearing in this matter. The Respondent's answers admit that the charge in this case was filed on March 11, 1998, and served by mail on March 12, 1998, less than 2 weeks after the Respondent's March 3, 1998 letter acknowledging its refusal to bargain. The complaint clearly alleges a violation only since the date of the Respondent's letter of March 3, 1998. The Respondent's contention that the 10(b) limitations period applicable to the present complaint commenced on July 28, 1997, when the Respondent first rejected a bargaining request is not significantly different from the 10(b) argument which the Board rejected in *Bentson Contracting Co.*, 298 NLRB 199 (1990), enf. denied on other grounds, but affd. in pert. part 941 F.2d 1262, 1264–1265 fn. 2 (D.C. Cir. 1991). For reasons stated in *Bentson*, the Respondent's rejection, on March 3, 1998—during the certification year—of the Union's subsequent bargaining request constituted an independent unfair labor practice. Contrary to the Respondent, the Board did not exclude cases in which such a second refusal repeated a refusal communicated in an earlier letter. Rather, the Board held that, as a matter of law, successive refusals during the certification year are separate unfair labor practices and cannot be deemed ''merely reiterations of an initial refusal to bargain.'' 298 NLRB at 200. The Respondent's reliance on the doctrine of laches is equally without merit, since the charge that is timely under the statutory limitations period will not be deemed barred by laches. *Hawaiian Flour Mill*, 274 NLRB 1108 fn. 2 (1985), enfd. 792 F.2d 1459 (9th Cir. 1986). We therefore find that this defense does not warrant denial of the Acting General Counsel's motion for summary judgment.

[3] In its answers, the Respondent states that it is without knowledge or information sufficient to form a belief as to whether the Union is a labor organization within the meaning of Sec. 2(5) of the Act. During the representation proceeding the Respondent did not question the Union's status as a labor organization. Its failure to raise this issue in the underlying representation proceeding precludes the Respondent from litigating the matter in this proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the second election held March 20 and 21, 1997,[4] the Union was certified on April 24, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time service maintenance employees employed by the Employer at its Green Springs, Ohio facility, including nursing assistants, ward clerks, wheelchair specialist aides, occupational therapy (OT) aides, TR aides, transport drivers, (TR transporters), medical record transcriptionist, medical record clerks, pastoral care associates, patient care technicians (PCTs), unit assistants, cooks, assistant cooks, cold food product clerks, dietary clerks, dietary aides, cafeteria aides, skilled maintenance employees, housekeepers, laundry operators, laundry/washer operators, clothing processors, therapeutic recreation (TR) coordinators, physician relations coordinators, program evaluation specialist, outpatient service coordinators, admissions coordinators, switchboard operators/receptionists, lifeguard /switchboard operators, and engineering technicians, but excluding all professional employees, licensed practical nurses (LPNs), certified occupational therapy assistants (COTAs), respiratory therapists (including RTTS, CRTs and lab techs), utilization review coordinators, assistant training instructors, managers of information services (MIS), dietary technicians, lab assistants /respiratory therapy, accounting clerks (A), accounting clerks (B), accounts receivable representatives, registered nurses, and all supervisors and guards as defined by the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About February 20, 1998, the Union, by letter, requested the Respondent to recognize and bargain, and, since about March 3, 1998, the Respondent has failed and refused. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By failing and refusing since about March 3, 1998, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, St. Francis Health Care Centre, Green Springs, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with District 1199, the Health Care and Social Services Union, SEIU, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time service maintenance employees employed by the Employer at its Green Springs, Ohio facility, including nursing assistants, ward clerks, wheelchair specialist aides, occupational therapy (OT) aides, TR aides, transport drivers, (TR transporters), medical record transcriptionist, medical record clerks, pastoral care associates, patient care technicians (PCTs), unit assistants, cooks, assistant cooks, cold food product clerks, dietary clerks, dietary aides, cafeteria aides, skilled maintenance employees, housekeepers, laundry operators, laundry/washer operators, clothing processors, therapeutic recreation

[4] The first election which was held on October 3 and 4, 1996, was set aside and a second election was directed by decision dated February 20, 1997.

(TR) coordinators, physician relations coordinators, program evaluation specialist, outpatient service coordinators, admissions coordinators, switchboard operators/receptionists, lifeguard /switchboard operators, and engineering technicians, but excluding all professional employees, licensed practical nurses (LPNs), certified occupational therapy assistants (COTAs), respiratory therapists (including RTTS, CRTs and lab techs), utilization review coordinators, assistant training instructors, managers of information services (MIS), dietary technicians, lab assistants /respiratory therapy, accounting clerks (A), accounting clerks (B), accounts receivable representatives, registered nurses, and all supervisors and guards as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Green Springs, Ohio, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with District 1199, the Health Care and Social Services Union, SEIU, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time service maintenance employees employed by us at our Green Springs, Ohio facility, including nursing assistants, ward clerks, wheelchair specialist aides, occupational therapy (OT) aides, TR aides, transport drivers, (TR transporters), medical record transcriptionist, medical record clerks, pastoral care associates, patient care technicians (PCTs), unit assistants, cooks, assistant cooks, cold food product clerks, dietary clerks, dietary aides, cafeteria aides, skilled maintenance employees, housekeepers, laundry operators, laundry/washer operators, clothing processors, therapeutic recreation (TR) coordinators, physician relations coordinators, program evaluation specialist, outpatient service coordinators, admissions coordinators, switchboard operators/receptionists, lifeguard /switchboard operators, and engineering technicians, but excluding all professional employees, licensed practical nurses (LPNs), certified occupational therapy assistants (COTAs), respiratory therapists (including RTTS, CRTs and lab techs), utilization review coordinators, assistant training instructors, managers of information services (MIS), dietary technicians, lab assistants /respiratory therapy, accounting clerks (A), accounting clerks (B), accounts receivable representatives, registered nurses, and all supervisors and guards as defined by the Act.

ST. FRANCIS HEALTHCARE CENTRE